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THE DEVELOPMENT OF MODERN DIPLOMACY*

II

Peaceful Settlement of Controversies Between Nations by Means of Arbitration, Congresses, or Judicial Decisions

By HON. JAMES BROWN SCOTT

Now that is an intolerable doctrine, which some authorities have handed down, that by the law of nations arms may rightly be taken up in order to weaken a power which is increasing and which, if increased too much, might inflict injury. I confess that in a deliberation about war this may also come into consideration, not from the point of view of justice, but from the point of view of utility; so that, if a war be just on other grounds, it may likewise be judged to have been undertaken prudently on this ground; and this is precisely the meaning of the authorities cited on this matter. But that the possibility of suffering violence gives the right to inflict violence is contrary to every notion of equity. Such is human life, that complete security is never apparent to us. Protection against uncertain fears must be sought from Divine Providence and blameless caution, not from force.†

IN THESE words a great Dutchman, whose name is familiar to us in its Latinized form of "Grotius," pays his respects to the principle of the balance of power, and to it opposes a principle which, although not so popular, is, nevertheless, making its way in the world.

Force has been opposed to force, and force in large or small quantities has not maintained peace. It cannot unless peace is in some way connected with force, so as to emerge from the clash of opposing force. Force is material and its fruits are material victories. Peace, we have at least learned within national lines, is the consequence of justice. It is the perfected fruit of justice, and agencies exist in abundance for the administration of justice, or at least that portion of it which we call rules of law.

Grotius states that "protection against uncertain fears must be sought from Divine Providence and blameless caution." Whether Divine Providence will listen to us in our distress is not for us to determine, although we may hope for protection if we conduct ourselves in accordance with the dictates of Divine Providence. "Blameless caution" he does not define and we need not dwell upon it. We would not be straining language if we should say that it implied having our quarrel just and then settling it by justice. Grotius himself was in favor of arbitration; he was also a believer in the submission of disputes between nations to conferences of the States. Tested by its fruits, the balance of power did not seem to him to be an agency of peace. On the con-

trary, peace is the offspring of arbitration between nations, just as peace within nations is the inevitable outcome of judicial decision. It is often a consequence of conferences. Arbitration developing into judicial decision, irregular conferences developing into conferences of the nations meeting at stated periods, are the content of modern diplomacy and are destined, as we hope, to succeed where the balance of power has failed.

I shall now ask your attention to each of these in turn.

Probably there is no better definition of arbitration—certainly there is none from a higher source—than that given by twenty-six nations of the world in the conference assembled at The Hague in 1899, and approved eight years later by forty-four nations, in the Second Conference of The Hague. According, therefore, to the consensus of opinion, international arbitration is, to quote the exact language of these two bodies, "the settlement of differences between States by judges of their own choice and on the basis of respect for law."

Arbitration has an ancient and honorable history. In this very course of lectures you have heard to what extent it flourished chiefly among the Greek States of antiquity, and how it was resorted to in the middle ages. It is said to be the shield and buckler of the weak; and yet, curiously enough, the chief treaties of arbitration concluded in the seventeenth century were those to which Oliver Cromwell, Lord Protector of England, was a party. The first treaty of arbitration in the modern series was the Jay Treaty, concluded by the United States with Great Britain in 1794, in the course of a war or series of wars from which Great Britain was to emerge as the strongest of nations. And the strength of Great Britain has not declined, for in our own day, with our own eyes, we have seen it, with its back to the wall, emerge from a desperate conflict stronger than ever. It is a fact that, of all countries, Great Britain has to its credit more arbitrations than any other nation.

The United States may have been weak in 1794, when it proposed that Great Britain and the United States should arbitrate their outstanding differences. It has grown with the years, and in its strength, as well as in the days of its weakness, it stands for arbitration, and, with the exception of Great Britain, has more arbitrations to its credit than any other nation. These two together made modern arbitration; they have been its chief practitioners, and the world has been the beneficiary. Therefore, it is not fair to say that only weak nations desire arbitration, although that would be a sufficient justification for it.

There were some powerful nations in the nineteenth century and in the first fourteen years of the twentieth who regarded it as the refuge of the weak. Germany prevented a general treaty of international arbitration from being concluded at the Second Hague Conference. Its then powerful ally, Austria-Hungary, supported it against the opinion of the world. They tried the sword. Republican Germany and mutilated Austria, if it remains independent, will doubtless be willing to try arbitration in the future.

But to come back to Cromwell. On April 5, 1654, he concluded the so-called Treaty of Westminster, between England and the Netherlands, in which, among other things, it was provided that the losses suffered by the

* The second of two addresses given before the School of Foreign Service, Georgetown University, December 3 and 17, 1920. These two addresses will be published entire in a pamphlet by the American Peace Society, April 1.—THE EDITORS.

† Hugo Grotius, *De jure belli ac pacis*, Lib. II, Cap. 1, § 17.

seizure and detention of English effects in Denmark since May 18, 1652, were to be made good according to an appraisal of certain "arbitrators indifferently chosen," and in case of a failure to adjust differences within a period of three months, they were to be submitted "to the judgment and arbitration of the Protestant Swiss cantons." An award was rendered by the commissioners, and under the 30th article of the same treaty losses of the East and West India companies were settled in the same manner. It is worth while noting, in passing, that in those days Holland was very far from a "weak" country.

Another treaty of Westminster was concluded on July 10, 1654, between England and Portugal, providing that demands on account of losses were to be referred to arbitration for settlement. The commission was to be composed of two Englishmen and two Portuguese, and on failure to agree the cases left undecided were to be referred to a member of the Lord Protector's Council, to be nominated by the Protector himself, and whose decision was to be final. Portugal was at this period a weak power; otherwise it would not have accepted such a person as Cromwell should be pleased to appoint.

The case was different with the Treaty of Westminster of November 3, 1655, between Cromwell, of the British Commonwealth, on the one hand, and Louis XIV, on the other. However, the two high contracting parties agreed, by article 24, to submit to three commissioners the legality of captures made by the two countries from 1640. In case of their inability to agree, the city of Hamburg was to delegate commissioners, whose award was to be made within four months, and was to be final.

Finally, the Treaty of Westminster, of July 15, 1656, between Cromwell, it may be said, on the one hand and Sweden on the other, provided that three commissioners should be delegated on each side to adjust differences and to settle the losses arising from capture made during the war between England and the Netherlands.

It would be a waste of time to speculate what might have happened if the views of that great man had dominated the conduct of nations—less interesting, perhaps, but certainly as useless as Pascal's statement to the effect that "if the nose of Cleopatra had been shorter, the whole face of the earth would have been changed." Cromwell's practice was not followed, and Cleopatra's nose was—as it was.

In the last quarter of the eighteenth century these United States of America came into being, and with them the doctrine that government derives its just power from the consent of the governed, and that justice should obtain between States as it does between men. The recognition of the independence of these States was contained in the Treaty of 1783, between Great Britain and the United States. It was alleged that neither of them lived up to their obligations under this treaty, and that acts of lawlessness were committed by each, which brought them to the verge of war. To avert this calamity President Washington, who believed and said that all disputes between nations should be settled by peaceful means, sent John Jay, then Chief Justice of the Supreme Court, to England to effect, if possible, a settlement. This he did, and the treaty which appropriately bears his name, provided in its fifth article for a com-

mission to decide which was the River Saint Croix intended by the Treaty of 1783. In this the commission was successful.

The sixth article provided that a commission should determine the losses suffered by British creditors because of the failure on the part of the American States to live up to the agreement of the treaty of peace. The commission awarded \$300,000 and broke up. The United States subsequently paid, in addition, a lump sum of \$3,000,000 in satisfaction of all these demands.

The seventh article provided that the claims of Americans for unlawful captures or destruction of their property upon the high seas, committed by Great Britain during the revolutionary wars then raging, should be submitted to a commission of five, and that the claims of British subjects for a failure of the United States to protect them within their jurisdiction, or because of the failure to prevent France from making unlawful captures, should be submitted to the same commission. The various claims were to be decided upon their merits and according "to justice, equity, and the laws of nations." Awards were made in favor of and against each. The five commissioners—of whom the chairman, John Trumbull, was curiously enough a former colonel in the Continental army and aide-de-camp to General Washington, Mr. Jay's secretary of legation at the time of his appointment, and a portrait painter of repute—were so successful that they not only settled the dispute between the two countries justly, but convinced nations of the advantages of arbitration.

Since then there have been many treaties of arbitration during the course of the nineteenth century, there have been innumerable cases adjusted by arbitration, and in the first decade of the twentieth century the world was, as it were, surrounded with a net of arbitration treaties. The instrument of peace was there, but it was not a self-starter; it needed to be set in motion. Unfortunately, it could be said of arbitration as Cardinal Fleury said to the Abbé St. Pierre anent his plan for perpetual peace: "You have forgotten an essential article, that of sending missionaries to touch the hearts of princes and to persuade them to accept your views."

To quote again the first expounder, if not the father, of international law, our friend Grotius, who says in his book on "The Law of Nations," published in 1625, during the Thirty Years' War: "It would be useful, and indeed it is almost necessary, that certain congresses of Christian powers should be held, in which the controversies which arise among some of them may be decided by others who are not interested, and in which measures may be taken to compel the parties to accept peace on equitable terms."

The remedy prescribed by the physician was tried in the congresses of Westphalia and Münster, in 1648, which put an end to the Thirty Years' War. It has also been tried on later occasions, notably in the Congress of Utrecht and of Vienna, and in a series of congresses in the nineteenth century—one at Paris in 1856, ending the Crimean War; another at Berlin ending the Russo-Turkish War, and culminating in the Conference at Paris of 1919. In all of these congresses or conferences some principles of international law have been discussed,

laid down, and accepted. But these principles were few in number; they were incidental, showing at most what a conference could do if it met in time of peace for this purpose, instead of meeting at the end of war. They were, however, war congresses, animated by a spirit of vengeance, in which, indeed, measures were taken, to quote Grotius, "to compel the parties to accept peace." They were not, however, his kind, as the peace imposed was not "on equitable terms." Grotius evidently meant a conference meeting under circumstances when equities could be considered. Controversies between some of the nations were to be submitted and decided by these conferences, not by the parties in dispute, but by others, which were not interested. In his conception, the States of Europe were looked upon as members of a great family, or great society, or great commonwealth, or of a great republic—the term is indifferent—and, because of the fact that all were affected to a more or less degree by a resort to arms, the powers affected, though not parties to the controversy, were to determine the conditions of peace upon equitable terms, because of the general, not of the specific, interest. It was not to be a congress meeting at stated terms; it was to meet from time to time, in case of need; but when it did meet, and was in session, it was apparently to be an assembly which could treat a dispute of a legal nature according to rules of law, and of an equitable nature according to what would be considered just and fair. There have, unfortunately, been very few gatherings of this nature, in accordance with the spirit of his proposal. The best example was but of yesterday, when, in 1884, a conference of interested powers met at Berlin, under Bismarck's presidency, to settle the disputes between powers claiming African territory, laid down rules of conduct for such powers, and provided for their peaceful settlement. This conference proved that the idea of Grotius was not Utopian, and it is perhaps not too much to say that it has kept the peace in Africa, which might have been broken and given rise to wars, as was the case for generations in the recently discovered and thinly settled tracts of America.

However, the idea which Grotius may have had in mind was more clearly expressed and brought to the attention of thinking people by one who was not, like Grotius, a writer on international law and a master of international relations. He had not held, as Grotius, the post of an ambassador. This obscure person was from the new world. His voice was the voice of the new world; his spirit was of the new world. He was the mouthpiece of the new diplomacy and he proposed the conferences of nations to be held in time of peace, to preserve peace, to take from the large domain of justice its principles, and to state them in rules of law for the conduct of nations. His plan has been tried and found workable, although, perhaps, those who called into being the conference which he advocated were unconscious that such a man as William Ladd ever lived.

What was the plan? The precedent which caused Ladd, founder of the American Peace Society, to propose his plan was American. Simon Bolivar, the Liberator of South America, as he is called, proposed a meeting of the Latin American States, hardly out of the cradle. The meeting of their representatives was to be held at Panama. The United States was invited, and,

after much controversy, our participation in the conference was authorized, but our delegates were appointed when it was too late. The conference failed.

From the Panama incident, "The inference to be deduced," Mr. Ladd said, "is that the governments of Christendom are willing to send delegates to any such Congress, whenever it shall be called *by a respectable State*, well established in its own government, if called in a time of peace, to meet at a proper place."* He was not, however, satisfied with representatives of the Christian powers. Perhaps he had doubts as to their Christianity. Ambassadors were to be appointed in addition, of "civilized nations," which might care to send them. He did not prescribe "the proper place." The Czar of all the Russias did that fifty-eight years later, in 1898. However many ambassadors or representatives a nation might send, it would only have one vote. They, therefore, were to meet on a plane of equality. They would discuss measures, and only such were to be adopted as all the nations should agree to, and the States were only to be bound which should subsequently ratify them. Certain subjects were not to be discussed.

"The Congress of Nations is to have nothing to do with the internal affairs of nations, or with insurrections, revolutions, or contending factions of people or princes, or with forms of government, but solely to concern themselves with the intercourse of nations in peace and war."† What measures were to be discussed? Mr. Ladd did not leave his readers in doubt, and it will be obvious to you that he outlined the program of the two Hague conferences.

The purpose of the conference was to settle "the principles of international law by compact and agreement, of the nature of a mutual treaty, and also of devising and promoting plans for the preservation of peace, and meliorating the condition of man."‡ Here is his program:

1st. To define the rights of belligerents towards each other; and endeavor, as much as possible, to abate the horrors of war, lessen its frequency, and promote its termination. 2d. To settle the rights of neutrals, and thus abate the evils which war inflicts on those nations that are desirous to remaining in peace. 3d. To agree on measures of utility to mankind in a state of peace; and, 4th, to organize a court of nations. These are the four great divisions of the labors of the proposed Congress of Nations.†

The first of these congresses, called The Hague Conference, met in 1899, in a time of profound peace, and did settle some of the principles of the laws of nations "by compact and agreement, of the nature of a mutual treaty." It expressed itself strongly and unequivocally in favor of arbitration for the settlement of disputes, and it created the so-called Permanent Court of Arbitration, which is in reality a list or panel of judges, from which a special tribunal or commission can be appointed, whenever States in dispute may be wise enough to lay their disputes before judges of their own choice, for the

* William Ladd, "An Essay on a Congress of Nations for the Adjustment of International Disputes without Resort to Arms," 1840, edition of 1916 [New York], p. 57.

† *Ibid.*, pp. 10-11.

‡ *Ibid.*, Advertisement, p. xlix.

decision of their controversies upon the basis of respect for law.

The second of the conferences met at The Hague in 1907, and attempted, in accordance with Mr. Ladd's fourth division, "to organize a court of nations." The court was not made, but progress was. A draft convention for the so-called Court of Arbitral Justice was adopted by the conference, with their recommendation to the powers to agree upon a method of appointing the judges, and thus constitute it.

A committee of jurists met at The Hague last summer to do this. The Council of the League of Nations adopted their project, with slight modifications, on October 27, and the Assembly of the League of Nations has just adopted the project, with some changes, a few days ago—indeed, on Monday of this week, December 13, 1920. By rejecting the principle of compulsory jurisdiction, they reverted practically to the proposed Court of Arbitral Justice of 1907.

In one respect, this is to be regretted, because the court of the nations should be one like the Supreme Court of the United States, in which State may sue State without a special agreement to the question in dispute, which is often difficult to frame. It is unfortunate, likewise, that a nation cannot, as a State of the American Union can, sue a State and obtain a judgment against the defendant, even although it does not appear and answer.

However, the first step was taken in 1907, and our French friends tell us that "it is only the first step that counts." A second step was taken in 1920, and a very long one, for an agreement was reached in the Advisory Committee and approved by the Council and the Assembly of the League of Nations, upon an acceptable method of appointing the judges. Many a step remains to be taken to supply law for the court and to enlarge its jurisdiction. But peace can only result in this practical world of ours from an infinite series of little steps. The nations are unwilling to make a leap in the dark. They fear, as do the sensible people of which they are composed, to fall in the ditch. Many conferences of the nations must be called to meet to take these steps. A third of The Hague series was due in 1915—that is to say, eight years after the adjournment of the second, in 1907, as the nations had agreed to a third at approximately this time. But the war came instead.

Will further conferences take place? If so, when, and what will be their general program? The Advisory Committee of Jurists that drafted the court project at The Hague last summer unanimously recommended a series of conferences, to be called "Conferences for the Advancement of International Law," to meet as successors to the first two Hague conferences, at stated times, to continue the work left unfinished, and the committee recommended further that the first of the series be held as soon as practicable for the purposes which they were bold enough to state, as follows:

1. To restate the established rules of international law, especially, and in the first instance, in the fields affected by the events of the recent war.
2. To formulate and agree upon the amendments and additions, if any, to the rules of international law shown to be

necessary or useful by the events of the war and the changes in the conditions of international life and intercourse which have followed the war.

3. To endeavor to reconcile divergent views and secure general agreement upon the rules which have been in dispute heretofore.

4. To consider the subjects not now adequately regulated by international law, but as to which the interests of international justice require that rules of law shall be declared and accepted.

If the world wants these conferences to meet at stated periods to take up the work of the world interrupted by the war, and where the war left it, they may do so.

In 1787 our own Benjamin Franklin wrote to a friend in Europe:

I send you enclos'd the propos'd new Federal Constitution for these States. I was engag'd 4 Months of the last Summer in the Convention that form'd it. It is now sent by Congress to the several States for their Confirmation. If it succeeds, I do not see why you might not in Europe carry the Project of Good Henry the 4th into Execution, by forming a Federal Union and One Grand Republick of all its different States & Kingdoms; by means of a like Convention; for we had many interests to reconcile.*

We are inclined to dwell upon our rights at the expense of our duties, which, however, our neighbors do not always overlook. Nations which are made up of the same men and women, more or less artificially grouped, are likewise inclined to look upon their rights as free, sovereign, and independent States. We must not, however, deceive ourselves. We have rights, but they are useless unless it be the duty of others to recognize and respect them; otherwise we would live in a state of anarchy. It is the same with nations, and for the same reasons. Therefore a problem of the new diplomacy is to devise some form of organization—call it a society, an association, or a league of nations, if you please—which, while recognizing the rights of nations and safeguarding them, shall at the same time state the duties of nation to nation, to the end that we may live in an ordered world—ordered, be it said, not from above, not from below, but by the States themselves, in the exercise of their freedom, sovereignty, and independence.

Many attempts have been made to reach this goal, by men of vision, whom the world calls dreamers; by statesmen, usually out of office and spending the remnant of their days in dignified retirement; latterly by hard-headed men of affairs, with the vision of the dreamer, but without the experience of the statesman. Persons interested in this sort of thing are familiar with the "great design of Henry IV," devised by his great minister, Sully, living in retirement after his master's death; with Penn's "Plan of a European Diet," at the close of the seventeenth century, by which the forces of the members were to be united in one strength, and to be used against the recalcitrant bent upon breaking the peace; with the project of the good Abbé de Saint-Pierre, in the first quarter of the eighteenth century, which he,

* Letter of Benjamin Franklin to Mr. Grand, October 22, 1787. "Documentary History of the Constitution," vol. iv, pp. 341-342.

like Sully, foisted upon Henry IV, and which is a tractate on perpetual peace, which he sought to usher into a war-ridden world; with Kant's "Perpetual Peace," appearing during the French Revolution and during the last decade of the eighteenth century, advocating republican—that is, constitutional or representative—government; with the Holy Alliance of Alexander I of Russia, proposing a league of nations, the members of which were to be kept in order by armed force; and with the more modest proposals of The Hague conferences, by which the nations regarded themselves as forming a society to be governed by justice and equity, recorded in instruments negotiated by them and to be applied in their mutual intercourse. These projects, however much they differ, have one point in common; they all provide for a union of States with duties as well as rights.

But I do not intend to speak of these projects or any of them. I would crave your indulgence for some closing remarks upon the one Union of States, extending over a vast area, controlling the actions of multitudes of men and women, which, surviving its framers and standing the test of time, may profitably be considered when questions of international organization are discussed.

Thirteen British colonies of North America, from New Hampshire on the north to Georgia on the south, declared, on July 4, 1776, their independence by deputies duly authorized thereto and representing them at the time in that distinguished Revolutionary body known as the Continental Congress, then in session at Philadelphia. Heretofore they had been colonies and called themselves such; hereafter they were States and called themselves such. They were united, some say, in 1774, by the Articles of Association; others, that they were united by the Declaration of Independence. The purpose, however, for which they were united was to secure, under the Articles of Association, a redress of grievances; under the Declaration of Independence, a recognition of their independence by the mother country. The union was temporary. It was not satisfactory. They felt that they needed to be drawn together closer and upon a permanent basis. Therefore a committee of Congress drafted Articles of Association for a league of friendship, permanent in its nature, which they called the Articles of Confederation, and in the second article the States declared themselves to be "sovereign, free, and independent" and possessed of every power which they did not expressly grant to the United States in Congress assembled.

The important point to bear in mind is that these States thought themselves to be free, sovereign, and independent, and therefore they stated themselves to be such. The Articles of Confederation only bound each State from the date of its approval. The last of the thirteen States approved of them on March 1, 1781, from which date there was a union in law, as well as in fact, of the thirteen American States.

The union, however, had many grave defects, the chief one being that it did not work, or at least that it did not work to their satisfaction. The far-sighted among them, therefore, proposed a more perfect union—of what? Of States, in place of the less perfect union of States.

For this purpose each of the States with the exception of Rhode Island, which abstained in the exercise of its

sovereignty, freedom, and independence, sent delegates to meet other delegates of the States of this imperfect union, in order to make the Articles of Confederation adequate for the exigencies of the Union. They were to have met on the second Monday in May, in Philadelphia. A majority of the States were not represented until the 25th, when they met. The delegates were appointed by the legislatures of the different States; they acted under instructions from their respective States. Their first act was to elect a chairman, one George Washington, delegate from Virginia, and a secretary. They thereupon proceeded to examine the credentials of the different members, in order to see that they were entitled to represent their States for the purpose in mind. Little by little the delegates of all the States arrived, with the exception of Rhode Island. Twelve States were, therefore, represented. The conference, called the Federal Convention, adjourned on September 17, 1787, having drafted the Articles of Union which we call the Constitution of the United States.

The delegates of this memorable assembly apparently had trouble with the preamble, inasmuch as only twelve of the thirteen States were represented, and feared that some of the States might not ratify the instrument, for it was to be presented to each of the States, to be considered by a convention in each of the States, specially called for that purpose.

The Constitution had made the ratification of nine States necessary for the government thereunder to go into effect—not for all of the States, but merely for the nine or more which might have ratified it. Two held out, and were, therefore, foreign States. One of these, North Carolina, came in in 1789. Rhode Island toddled in in 1790.

How was the preamble to begin? All the drafts save the last, reported by the Committee on Style on September 12, began with "We, the people of the States of New Hampshire, Massachusetts, Rhode Island," etc., down to and including Georgia—that is to say, they enumerated the thirteen States, beginning with the most northern and ending with the most southern. Should the thirteen be included when only nine might ratify, and when, as a matter of fact, two out of the thirteen did not until after the Constitution and the government under it went into effect? Some clever draftsman, probably Gouverneur Morris, who was a member of the Committee of Style and Arrangement, and to whose facile pen the excellent literary style of the instrument is accredited, solved the difficulty by striking out all the names of the States and inserting "United" before "States"; so that the Constitution, instead of reading, "We, the people of the States of New Hampshire," etc., read now, reads, and ever will read, "We, the people of the United States." We should not, however, overlook the fact that it was the people of the States, it was the people of each of the States, that ratified the Constitution; it is the people of each of the States that elect the members of the Senate and the House of Representatives, and it is the electors chosen by the people within each of the States who elect the President of these United States.

As that prince of jurists, the great Chief Justice Marshall, said in one of his greatest cases, decided in 1819:

No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States.*

Because of this, their experience is valuable to people of foreign States, who also act, when they act, within their States. Each State of the American Union has two constitutions. One is local, dealing with those matters that begin and end within the boundaries of the State. It may be amended whenever the people so desire. The second constitution is not local, but general. It deals with matters that may begin within a State and extend beyond it, or which arise without the States and yet affect them, as in the case of foreign affairs. This Constitution is the Constitution of the United States, ratified by each of the States, and declared by article 6, section 2, thereof to be the supreme law of each of the States. It cannot be amended, or modified, or varied by any State. They adopted the Constitution as a whole, article 5 of which provides that amendments to the Constitution, to be effective, must be "ratified by the Legislatures of three-fourths of the several States, or by conventions in three-fourths thereof." The Constitution is not, therefore, to be like the law of the Medes and the Persians. It changes with the changing moods of three-fourths of the States.

The States created the Government of the United States as their agent for the purposes which they stated expressly or by necessary implication, and for none others. Additional powers may be added by amendment. The legislative branch, consisting of a Senate and a House of Representatives, has certain specified powers; the executive branch, whereof the President is the head, has prescribed duties; the judicial branch, of which the Supreme Court is the head, has certain jurisdiction. Any group of foreign States wishing to follow the example of the American States can. They do not need to confide so many powers upon the government of their creating unless they want to do so. But there are two things of fundamental importance which they should do, if they want their union to outlive its makers: they should eliminate the question of large and small States, as the wise men of the Federal Convention did, by providing that one of the chambers, which we call the Senate, should represent the States equally, and that a second chamber, which we call the House of Representatives, should represent the States according to population. In this way each branch would have a veto upon the abuse of power by the other, and by means of a conference committee between the two houses there would be passed, under the pressure of public opinion, such legislation as was needed.

The second requisite is that, to the extent of its granted powers, the government of the union should act upon each member of the State. States cannot act of themselves; they must act by agents. An agent attempting to do an act contrary to the fundamental law can be restrained. As the act, therefore, is not committed by the State, but by an individual, the State is not involved; merely the person claiming authority which he does not

possess, whether that be under the statute of a State in conflict with the act of union or due to a false interpretation of the act of union. This simple principle, new in political science when it was devised by the wise men of the Federal Convention, has made it unnecessary to coerce sovereign States, which the wisest of that assembly—Messrs. Mason and Madison, Hamilton and Ellsworth—knew was impossible, and said so, both in and out of convention.

To interpret the act of union, and in so doing to assure to the government of the Union its full rights; to protect the States of the Union in the exercise of their rights and to define the duties of each in their appropriate spheres, we have the Supreme Court of the United States.

The nations have made a beginning. We are familiar with conferences at The Hague. They can meet at stated intervals, submitting their acts to each nation for ratification and binding only those that so ratify. This would prove itself to be, in the course of time, no mean legislature. A committee appointed by the nations might act in the interval of the conference and exercise such powers with which the nations in conference should vest it. A court of the nations could be created—indeed, it apparently has been created by act of the Assembly of the League of Nations on the 13th of December, 1920.

If Europe should wish to follow Dr. Franklin's advice, the way is still open. Should all the nations wish to follow in the footsteps of the conferences which have met at The Hague, and, without creating a close union, organize the world upon the basis of justice and the rules of law, this can also be done.

In either event the experience of the United States will be helpful. For this country of ours was founded, as James Russell Lowell has so beautifully said, "By men with empires in their brains."

LAW IN WAR TIME

IN HARMONY with most of its previous decisions on the validity of the Espionage Act, the Federal Supreme Court has just upheld the late Postmaster General, Mr. Burleson, in his exclusion from the mails of the *Milwaukee Leader* and *New York Call* during certain periods of the war. The majority of the court holds that the tendency of the articles that brought on the withdrawal of second-class mail privileges was not to secure a modification or repeal of the laws they criticized, but were intended to "create a spirit of insubordination and disloyalty." Justices Holmes and Brandeis again dissented, as they have in prior cases. They claim that if administrative officers in times of peace can discriminate against publications on grounds approved by a majority of the court, then "there is little substance to our Bill of Rights, and in every extending governmental function lurks a new danger to civil liberties."

The question here involves the loyalty of the judiciary to the other two branches of government in war time. If we grant that it is even proper for a government to engage in war, we must then consent to the abrogation of constitutional government in every respect found to be necessary for the successful conduct of the war. War law is *sui generis*.

* *McCullough v. Maryland*, 4 Wheaton, 316, 403.